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June 1, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., N.W.
Washington, D.C., 20554

Re: Petition on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act; CC Docket No. 98-39

Dear Ms. Salas:

On behalf of the Competitive Telecommunications Association ("CompTel"), the Florida Competitive Carriers Association ("FCCA"), and the Southeastern Competitive Carriers Association ("SECCA"), I am enclosing the Reply Comments of the Petitioners in the proceeding referred to above. Please contact me if you have any questions.

Respectfully submitted,

David Sieradzki

David L. Sieradzki
Counsel for CompTel, FCCA, and SECCA

Enclosures

cc: Parties on attached service list

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association	)	CC Docket No. 98-39
Petition On Defining Certain Incumbent LEC Affiliates As Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act	)	

REPLY COMMENTS OF THE PETITIONERS

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SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION

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Their Counsel

Dated: June 1, 1998

SUMMARY

The record in this proceeding supports prompt action to establish a rebuttable presumption that would prevent the ILECs from using "CLEC" affiliates to evade their local competition obligations. Contrary to the claims of some ILECs, our Petition is directed not to *all* ILEC affiliates, but rather to the specific subset of ILEC affiliates that: (1) provide wireline local exchange and/or exchange access service, (2) within the same geographic area served by an affiliated ILEC, (3) using the ILEC's corporate or brand name or any other resources useful in providing local telephone service. Such entities would be deemed "successors," "assigns," or "comparable carriers" under Section 251(h), unless the ILEC and the affiliated entity demonstrate otherwise.

There is no real-world difference between the ILECs themselves and their *alter ego* "CLEC" affiliates, and no legitimate reason to exempt those entities from the obligations that apply to ILECs. The burden of proof in this factual inquiry must rest on the ILEC and its affiliate because these are the only entities with the information required to make this determination and with the ability to alter the factual circumstances where necessary. In the absence of a rebuttable presumption, once an ILEC local affiliate is operating and serving customers, it would be very difficult to change that entity's regulatory status and "put the genie back into the bottle."

Section 251(h) and the relevant case law provide strong support for establishing the rebuttable presumption ruling we propose. Indeed, in

communications and other fields of law, courts and agencies routinely pierce the corporate veil between an original company and a new entity (whether termed a "successor" or "assign," or other terminology is used) when the two entities function as *alter egos* of one another and formation of the new entity facilitates avoiding legal obligations. While the Commission has not, to date, directly addressed the issues raised in our Petition, the rebuttable presumption we seek is fully consistent with Commission precedent, including the *Non-Accounting Safeguards Order*, the *Regulatory Treatment Order*, and the *Guam NPRM*. And state experiences with the ILECs' establishment of "CLEC" affiliates underscore the need for prompt Commission action under Section 251(h), given ILECs' attempts to set up *alter ego* "CLEC" entities all around the country.

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Petition On Defining Certain Incumbent LEC Affiliates As Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act	)	

REPLY COMMENTS OF THE PETITIONERS

The Competitive Telecommunications Association ("CompTel"), the Florida Competitive Carriers Association ("FCCA"), and the Southeastern Competitive Carriers Association ("SECCA") (collectively, "Petitioners"), by their attorneys, hereby file their reply comments in the above-captioned proceeding. 1/

INTRODUCTION: THE COMMISSION MUST ACT VIGOROUSLY TO PREVENT THE ILECS FROM CIRCUMVENTING THEIR LOCAL COMPETITION OBLIGATIONS.

Although over two years have elapsed since the enactment of the Telecommunications Act of 1996 ("1996 Act"), local competition still has barely gotten off the ground. The blame for this stalemate can be laid squarely at the feet

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1/ Public Notice, *Commission Seeks Comment on Petition Regarding Regulatory Treatment of Affiliates of ILECs*, CC Docket No. 98-39, DA 98-627 (released April 1, 1998); *Competitive Telecommunications Association*, CC Docket No. 98-39, Order Extending Time to File Reply Comments, DA 98-867 (Com. Car. Bur., released May 8, 1998).

of the incumbent local exchange carriers ("ILECs"). They have used every possible tactic to impede competitive entry. For example, they have raised legal challenges to virtually every pro-competitive decision of this Commission and state regulators. They also have dragged their feet in developing the necessary operational support systems that competitive local exchange carriers ("CLECs") need to resell ILEC services and to use ILEC network elements. 2/

Our Petition identifies the latest ILEC tactic to delay or impede local competition -- the formation of so-called "CLEC" affiliate companies. These entities are set up to offer the same local exchange and exchange access services that the ILEC already offers, in the same geographic areas, to the same customers, using the same (or similar) corporate and brand names and other valuable resources. As discussed by numerous commenting parties, there is no real-world difference between the ILECs themselves and these *alter ego* affiliate entities, and no legitimate reason to exempt the ILEC affiliates from the local competition requirements of Section 251(c) of the Act, the Section 272 rules regarding relationships among corporate affiliates of Bell operating companies ("BOCs"), and other dominant carrier rules that apply to the ILECs.

Worse, the ILECs will be able -- and may have already begun -- to abuse these *alter ego* corporate entities to the detriment of competition. For

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2/ *See, e.g., Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance,* CC Docket No. 98-56, Notice of Proposed Rulemaking, FCC 98-72 (released April 17, 1998).

example, by shifting customer-specific contract service arrangements and other service offerings from their ILEC entities to these so-called "CLECs," the ILECs gain the opportunity to impose a price squeeze on real CLECs that depend on service resale pursuant to Section 251(c)(4), with very limited risks to the overall ILEC corporation's bottom line.

Section 251(h) of the Act provides a basis for the Commission to put an end to this charade. As our Petition and several commenting parties point out, there is a strong legal basis for the Commission to adopt a rebuttable presumption that these ILEC-affiliated entities are "successors" or "assigns" of the ILECs under Section 251(h)(1) or "comparable carriers" under Section 251(h)(2), and thus that those entities are subject to the Section 251(c) and other obligations of the ILECs. By adopting the declaratory ruling (and/or initiating the rulemaking proceeding) outlined in our Petition, the Commission can ensure that the ILECs' in-region local telecommunications services and facilities will be subject to the pro-competitive rules governing ILECs, regardless of the corporate shell through which those services and facilities are deployed.

The Commission should give no credence to the bucket of red herrings proffered by the ILECs in opposition to the Petition. First, Section 251(h) and pertinent case law give the Commission ample authority to treat corporate entities that, for all practical purposes, are *alter egos* of the ILECs, as ILECs themselves. Contrary to the ILECs' proposed narrow construction of the terms "successor" and "assign," it is clear that "there is, and can be, no single definition of 'successor' [or

'assign'] which is applicable in every legal context." 3/ In the context of Section 251, the construction of these terms, as well as the term "comparable carrier," set forth in the Petition is more logical and consistent with the intent of the 1996 Act than the ILECs' predictably strained alternatives.

Second, there is no basis for the ILEC argument that the Commission, in the *Non-Accounting Safeguards Order* 4/ or elsewhere, has already blessed the formation of ILEC-affiliated CLECs to evade local competition obligations. To the contrary, while the *Non-Accounting Safeguards Order* is silent on the specific issues addressed by the Petition, it generally provides support for the relief requested. Similarly, the Commission has never squarely addressed the definition of "comparable carriers."

Third, the Commission must rebuff the ILECs' attempts to deregulate themselves based on a spurious distinction between the ILEC operating companies and their holding company entities. Like the unsustainable distinction between ILECs and their CLEC *alter egos*, this disingenuous shell game must be rejected.

3/ *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 262 n.9 (1974).

4/ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*"), *recon.*, FCC 97-52 (released Feb. 19, 1997), *second recon.*, 12 FCC Rcd 8653 (1997), *pet. for review denied sub nom. Bell Atlantic v. FCC*, No. 97-1432 (D.C. Cir. Dec. 23, 1997); *pet. for review pending sub nom. SBC Communications v. FCC*, No. 97-1118 (D.C. Cir. filed Mar. 6, 1997) (held in abeyance pursuant to court order issued May 7, 1997).

Finally, contrary to BellSouth's mischaracterization, many of the state commissions that have considered the issue have denied certification within the ILEC's service area, imposed significant conditions on grants of authority, or focused exclusively on a showing of technical or managerial competence because they lacked the regulatory tools to grapple with the substantive issue. Nonetheless, the fact that so many ILECs around the country are seeking state certification for such "CLEC" affiliates underscores the need for prompt Commission action.

We address these and related issues in detail below.

I. THE ILECS MISCHARACTERIZE THE DECLARATORY RULING AND RULEMAKING REQUESTED BY THE PETITIONERS.

Several of the ILECs opposing the petition either apparently fail to understand the relief that the Petitioners seek, 5/ or mischaracterize the Petition in order to create an easily toppled straw man. For example, we emphatically do *not* seek a ruling that would treat *all* ILEC "affiliates," as defined in Section 3(1) of the Act, as "successors" and "assigns" for Section 251(h) purposes. 6/ Rather, our Petition is directed to a specific subset of Section 3(1) affiliates of ILECs -- those that (1) provide wireline local exchange and/or exchange access service, (2) within the same geographic area served by the conventional ILEC operating company, (3) using common corporate or brand names or any other resources useful in

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5/ *E.g.*, Ameritech at 1-2 n.1.

6/ *Contra see* Bell Atlantic at 3-4; SNET at i, 5, 6; SBC at 4; Ameritech at 19-20.

providing local telephone service that have been transferred from the ILEC or another corporate family member (such as the parent holding company).

Of course, it is relatively easy to determine that a particular corporate entity satisfies criteria (1) and (2) listed above, but it may be relatively difficult to ascertain what resources have been transferred to that entity. For this reason, our Petition proposes the establishment of a *rebuttable presumption* that any entity that satisfies criteria (1) and (2) above, and that uses the same or similar corporate or brand names, constitutes a "successor" or "assign" of the ILEC for purposes of Section 251(h). The ILEC affiliate would have the burden of coming forward with factual information that would demonstrate that it should *not* be treated as a "successor" or "assign."

That factual showing, however, taken as a whole, must be sufficient to demonstrate that the affiliate is not a mechanism to defeat the crucial requirements of the Act applicable to ILECs. Examples of the types of factual showings that, in combination, would help rebut the presumption might include the following:

- As a practical matter, consumers in the marketplace do *not* perceive the ILEC and the affiliate as *alter egos*.
- Assets useful in the provision of local exchange service, including but not limited to brand names, financial resources, and human capital, have *not* been shifted from the ILEC to the affiliate.
- There is sufficient financial and managerial isolation between the affiliate and the ILEC to prevent incentives for the two entities to engage in price squeezes, predatory pricing, or other forms of anti-competitive behavior.
- The affiliate uses the same operational support systems as independent CLECs, and interconnects with the ILEC under terms each of which is available as a practical matter to independent CLECs.

- Other safeguards exist to prevent abuse of the affiliate relationship to engage in anti-competitive conduct, such as a guarantee that investment in enhancements to the existing network, such as xDSL loops, will *not* be shifted from the ILEC to the affiliate to prevent access to those enhancements by competitors.

- The ILEC is in full compliance with its local competition obligations under Sections 251, 252, 271, and 272, and effective federal and state rules implementing those statutory provisions. 7/

Section 251(h) requires that the burden of proof in this factual inquiry be on the ILEC and its affiliate, not the Commission or competitive carriers. Section 251(h) is intended to prevent the ILECs from side-stepping their duties through new corporate organizations. Given the statute, and particularly given the ILECs' recalcitrance in complying with the Act, they must bear the burden of justifying why an affiliate should be excused from ILEC responsibilities. This is all the more proper because the ILEC and its affiliate are by far in the best position to provide the factual information and to alter the factual circumstances if necessary. Thus, rather than establishing factual predicates that, if found to exist, would render the affiliate a "successor" or "assign," we propose the establishment of a *presumption* that any affiliate satisfying the easily determined criteria described

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7/ Another way for an ILEC to rebut the presumption that its affiliate should be treated as a "successor" or "assign" under Section 251(h) would be to show that it satisfies the "seven minimum" safeguards identified in LCI's "Fast Track" petition. *Petition of LCI International Telecom Corp. for Expedited Declaratory Rulings: A "Fast Track" Plan to Expedite Residential Local Competition And Section 271 Entry Through Establishment of Independent RBOC Wholesale and Retail Service Companies*, CC Docket No. 98-5, at 29-31 (filed Jan. 22, 1998). Those safeguards are intended to ensure operational and financial independence between the ILEC ("NetCo" in LCI's proposal) and the affiliate (LCI's "ServeCo"). We hope this clears up Ameritech's confusion over how our Petition in this proceeding and LCI's "Fast Track" Petition are consistent. *See* Ameritech at 4-5; *see also* LCI at 3-5.

above is a "successor" or "assign," and allowing the ILEC and its affiliate to submit evidence to rebut that presumption, if they can.

Furthermore, just as the framers of the 1996 Act, quite sensibly, put the burden of proof with regard to Section 271 entry on the BOCs, the ILECs should bear the burden of proof in the context of Section 251(h) as well. The Commission has no good remedies for an after-the-fact conclusion that an ILEC affiliate "should have" been complying with Section 251(c) and other requirements under the Act. It would be difficult or impossible for competitors and/or the Commission to prevent anti-competitive conduct by ILECs' "CLEC" affiliates before it occurs. Given the time period that is typically necessary for the Commission to resolve such issues, and the probable delay in obtaining the necessary information from the ILECs and their affiliates, in the absence of a rebuttable presumption it is quite likely that "the horse would be out of the barn door" before the Commission could resolve the issue. Once the ILEC local affiliate is up and running, and especially once it has started providing service to customers, it would be very difficult to change that entity's regulatory status and "put the genie back into the bottle."

Sprint proposes a number of specific factual inquiries, each of which may be relevant to a Commission decision on whether an ILEC affiliate should be treated as a "successor" or "assign" under Section 251(h). 8/ We agree that the

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8/ Sprint at 5-7. Sprint proposes classifying an affiliate as a "successor" or "assign" if it constructs new facilities (*e.g.*, an xDSL or data network) in the ILEC's region that the ILEC chooses not to build on its own, if it provides new local telecommunications services not also made available directly by the ILEC, or if

criteria proposed by Sprint would constitute powerful evidence that the ILEC is abusing the affiliate to avoid complying with its local competition obligations, and that those factual predicates would strongly indicate that the affiliate is an *alter ego* of the ILEC and should be treated as such. But we believe it would be impractical to put the burden on competitors or the Commission to show that the affiliate satisfies the criteria. We think the alternative approach outlined here and in our Petition -- establishing a rebuttable presumption that a broad class of affiliates are to be defined as "successors" or "assigns," with an opportunity for the ILEC affiliate to rebut the presumption with factual evidence -- would be more workable. In this context, an ounce of *prevention* of anti-competitive conduct in advance is worth a pound of cure. 9/

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existing customer contracts are transferred from the ILEC to the affiliate (such as by waiving termination charges).

9/ Other commenters also have suggested alternative criteria that would trigger an ILEC's "CLEC" affiliate being designated as a successor or assign under Section 251(h), *e.g.*, TRA at 6; e.spire at 1-3, 4; WorldCom at 8; NEXTLINK at 2, 6; MCI at 3; TCG at 1-3; ALTS at 5-6; AT&T at 6; Intermedia at 5-6, as well as additional requirements and prohibitions that could be imposed on such entities. *E.g.*, e.spire at 5-6; Intermedia at 4; TCG at 6-7. Many of these suggestions constitute positive contributions to the debate and should be taken into consideration. At a minimum, however, the declaratory ruling (or rulemaking) requested in our Petition would directly address the core problem.

ITTA submits that midsize ILECs (*i.e.*, those eligible for exemptions under Section 251(f)(2) of the Act) and their affiliates should not be subject to the rebuttable presumption proposed in the Petition. ITTA at 1-10; *accord* NTCA at 2. We agree that the Commission's scarce enforcement resources would be better focused on the anti-competitive activities of larger ILECs rather than small and midsize ILECs eligible for Section 251(f)(1) or 251(f)(2) exemptions.

II. THE RECORD SHOWS THE NEED FOR PROMPT ACTION TO STOP ILECS FROM USING "CLEC" AFFILIATES TO EVADE STATUTORY OBLIGATIONS AND ENGAGE IN ANTICOMPETITIVE CONDUCT.

There is no real-world difference between the ILECs themselves and their *alter ego* "CLEC" affiliates, and no legitimate reason to exempt these ILEC affiliates from the statutory and regulatory obligations that apply to ILECs. Numerous commenters in this proceeding 10/ -- including some ILECs 11/ -- agree that ILECs could use affiliated companies, set up to provide local telecommunications services within the ILECs' service areas, to avoid complying with their local competition obligations, while retaining the market advantages of incumbency. There is no service that a "CLEC" affiliate could legitimately provide that cannot already be offered through the ILEC itself and/or through properly constituted long-distance and/or information service affiliates governed by Section 272. 12/ Absent a clear factual showing to the contrary, it would appear that the only possible reason for an ILEC to establish such an affiliate is to evade local competition and other regulatory obligations.

10/ WorldCom at 2, TRA at 5-6, e.spire at 1-2, TCG at 1-3, ALTS at 1-2 , Intermedia at 4, KMC at 1-2, AT&T at 1-4, ICG at i-ii, 1-4, 11, NEXTLINK at 4-6; MCI at 1-5; Sprint at 2, 3-4.

11/ For example, GTE admits outright that ILECs create local affiliates for the express purpose of avoiding the "burdensome" obligations imposed on the ILECs by Section 251. GTE at 2-3.

12/ For example, there is no restriction on a BOC's jointly marketing its local service with its Section 272 interLATA affiliate's long distance service, once the BOC receives authorization under Section 271. 47 U.S.C. § 272(g)(2); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22046, ¶ 291.

In particular, as stated in our Petition and explained in detail by commenters in this proceeding, the most likely provision of Section 251 to be violated in the near term through the ILECs' creation of local affiliates is the resale requirement of Section 251(c)(4). 13/ Economic logic would prompt ILEC-affiliated "CLECs" to target medium to large business customers currently served by the ILEC, as BellSouth BSE has stated it will do. 14/ In this way, the ILEC effectively could transfer the customer-specific contract service arrangements ("CSAs") offered to those customers from itself to its "CLEC" affiliate, thus exempting such CSAs from the Section 251(c)(4) requirement that these arrangements be offered to requesting carriers at a wholesale discount. 15/ In turn, by foreclosing the resale of CSAs, ILECs like BellSouth will be able to prevent resellers from competing for large-volume customers. 16/

One ILEC makes the facile argument that the transfer of CSAs to the "CLEC" affiliate would not affect the ability of other providers to compete for a customer's business when the "CLEC" affiliate is purely a resale entity because the

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13/ Petition at 6; TRA at 5-6, e.spire at 1-2, 4; ICG at 9, NEXTLINK at 5.

14/ Petition at 6; South Carolina Public Service Commission, *Application of BellSouth BSE, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Service in the State of South Carolina*, Docket No. 97-361-C, Hearing No. 9703 (November 5, 1997) ("SC PSC Hearing No. 9703"), Cross Examination of Robert C. Scheye, Vice President, Supplier Development and Business Relations for BellSouth BSE, Inc., at Tr. 61-62.

15/ Petition at 6; 47 U.S.C. § 251(c)(4); 47 C.F.R. §§ 51.605, 51.613.

16/ TRA at 5-6.

underlying piece-parts of any particular CSA are available for resale on the same rates, terms, and conditions. 17/ One answer is that Section 251(c)(4) is not limited to this "piece part" resale. Furthermore, ensuring access by competitors to a discounted version of the retail arrangements themselves, rather than their underlying piece-parts, is essential to preventing the ILECs from engaging in resale price squeezes. If an ILEC, by transferring CSAs to its "CLEC" affiliate, could exempt its CSAs from the Section 251(c)(4) requirement that these arrangements be offered to requesting carriers at a wholesale discount, 18/ the ILEC, through its "CLEC" affiliate, could lower the retail price of a CSA without offering a corresponding decrease in the wholesale rate at which competitors could obtain either the CSA or its underlying piece-parts. A price squeeze would result as the retail prices of the CSAs approach the levels at which independent competitors must purchase the "underlying piece-parts" of the arrangement from the ILEC. As a result, the ILEC could reduce or eliminate its resale competitors' profit margins on these services, making it impossible for other carriers to resell the ILEC's services in a financially viable, much less competitive manner. Even though the "CLEC" affiliate would be required to make its CSAs available for resale to competitors, it would have no obligation to do so at discounted wholesale rates. 19/

17/ Frontier at 5.

18/ 47 U.S.C. § 251(c)(4); 47 C.F.R. §§ 51.605, 51.613.

19/ Similarly, the ILEC could impose a price squeeze by over-pricing its unbundled network elements while offering selective retail price reductions to the largest and most profitable customers, thus restricting its competitors' access not only to essential customers, but also to bottleneck facilities. MCI at 7.

In addition, commenters in this proceeding demonstrate that ILECs could use their local affiliates to channel the provision of new services and network facilities through the "CLEC" affiliate. Unless the Commission adopts the rulings we have requested, that entity would have no obligation under Section 251 to make either the network elements or interconnection available to competitors. At the same time, the ILEC could allow the ILEC's local services and network facilities to degrade, thus disadvantaging competitors *vis a vis* the ILEC's "CLEC" affiliate. 20/ In addition, or in the alternative, the ILEC could produce unbundled network elements uniquely tailored to meet the needs of its local affiliate, but of little use to any other competitor, and then offer those network elements at low prices, thus discriminating in favor of the "CLEC" affiliate. 21/ Similarly, by creating a "CLEC" affiliate, the ILEC might be able to evade contractual nondiscrimination requirements otherwise imposed on the ILEC through its interconnection agreements with competing carriers. 22/ Finally, ILECs would be able to discriminate in favor of their affiliates and against other competitors by offering adequate OSS only for resale -- which would likely favor the "CLEC" affiliate, while offering no (or inadequate) OSS for network elements, which would hurt most competitive carriers. 23/

20/ *Id.* at 6-7, 8.

21/ *Id.* at 10, 17.

22/ *Id.* at 11-12.

23/ *Id.* at 12-13.

These risks are not merely theoretical. For example, Ameritech Michigan has established an affiliate, ACI, through which it will provide out-of-region local exchange and interLATA services, and eventually in-region local exchange services. 24/ In seeking in-region local exchange authority, ACI admitted to the Michigan Public Service Commission that it was receiving a minimum of $90 million in funding from Ameritech Michigan, none of which was accompanied by any written commemoration or repayment schedule. 25/ Similarly, our Petition recounted on-the-record admissions by representatives of BellSouth BSE, indicating the likely anti-competitive aspects of the relationship between that "CLEC" entity and BellSouth. 26/ Moreover, BellSouth BSE's business plan indicates a growth rate far beyond that of a *bona fide* CLEC: by the end of *this* year, BellSouth BSE expects to have 325,000 customer accounts and 13,000 business accounts. 27/

24/ TCG at 3-5; *see also* e.spire at 6-7. As discussed below, the Michigan Public Service Commission rejected ACI's application to provide local service within the Ameritech Michigan service territory, until the FCC grants Ameritech Michigan authority to provide in-region interLATA service. *Ameritech Communications, Inc.*, Order Approving Application, Case No. U-11053 (Michigan Pub. Serv. Comm'n August 28, 1996) ("*Ameritech Communications, Inc.*") at 17 (granting ACI authority to provide basic local exchange service within the service area of GTE but denying ACI such authority within the service area of Ameritech Michigan until Ameritech Michigan is authorized by FCC to provide interLATA service).

25/ TCG at 4-5 and materials cited therein.

26/ Petition at 5.

27/ This information was presented in an exhibit filed by BellSouth BSE in a North Carolina proceeding, and is attached as Attachment A to these reply comments.

III. THE COMMISSION SHOULD ESTABLISH A PRESUMPTION THAT CERTAIN IN-REGION LOCAL SERVICE AFFILIATES OF ILECS ARE SUCCESSORS, ASSIGNS, OR COMPARABLE CARRIERS UNDER SECTION 251(h).

A. Relevant Case Law Supports the Designation Of An ILEC *Alter Ego* Affiliate As A "Successor" or "Assign" Of the ILEC.

The relevant case law provides strong support for the declaratory ruling we propose in the Petition. In our Petition, we noted that, while the terms "successor" and "assign" are not defined in the Communications Act and are not discussed in the legislative history, the declaratory ruling we are seeking is consistent with the way those terms have been used in other fields of law. In particular, we cited several Supreme Court decisions explicating the meaning of those terms in the labor law context. 28/ Several ILECs respond by arguing that in those and other cases using the terms "successor" or "assign," the original company had ceased to exist and had been "succeeded" by a new entity, or its assets and business operations had been "assigned" to a new entity; and they reason that since the ILEC operating companies continue to exist, their "CLEC" affiliates cannot be "successors" or "assigns" of the ILECs. 29/

The "successor" or "assign" concept is by no means as rigid and limited as these ILECs would have the Commission believe. As other commenters have noted, "there is, and can be, no single definition of 'successor' which is applicable in

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28/ *See* Petition at 9-10 & nn.17-19 and cases cited therein.

29/ *E.g.*, Ameritech at 14-15; GTE at 5.

every legal context." 30/ The central issue in determining whether a new entity is a "successor" or "assign" of an original company, and therefore subject to similar legal obligations, is not, as the ILECs would have it, the narrow and (in this context) somewhat irrelevant issue of whether the original company continues to exist or do business.

Rather, the key to determining the new entity's "successor" or "assign" status is whether there is a "substantial continuity" between the enterprises, based upon the totality of the circumstances. 31/ In other words, the central question is whether the original company and the new entity are, for practical purposes, *alter egos* of one another. Significant factors in making this determination are whether the two enterprises are under common management and control, and whether they offer the same or similar products or services to the same groups of customers in the same geographic areas using common resources. 32/ Each of these factors is likely to exist in the circumstances we have identified, unless the ILEC and its affiliate can provide evidence to overcome the rebuttable presumption we propose.

Courts and regulatory agencies are particularly inclined to "pierce the corporate veil" between an original company and a new entity when the principal effect of forming the new entity is to avoid the effect of legal obligations. 33/ As

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30/ *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 262 n.9 (1974).

31/ *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

32/ *See* Petition at 9-10 & nn.17-19 and cases cited therein.

33/ *Howard Johnson*, 417 U.S. at 259 n.5.

MCI aptly points out, there is precedent for taking this approach in cases involving efforts to evade the common carrier regulatory provisions of the Communications Act of 1934, as amended. 34/ MCI also shows that the same principle has been applied in a wide range of relevant cases in various other fields of law, demonstrating clearly that courts have "consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." 35/ And it is abundantly clear that there is no benefit ILECs would receive justifying the establishment of so-called "CLEC" entities, other than avoidance of Section 251(c) and related obligations, because there is nothing that such a "CLEC" can do that the ILEC cannot do itself (or in conjunction with a legitimate Section 272 affiliate). 36/

In sum, given the lack of direct controlling precedent on the interpretation of "successor" or "assign" in Section 251(h)(1), the clearest and most supportable interpretation in this context is that proposed in the Petition: that an ILEC affiliate offering wireline local telecommunications in the same geographic area as the ILEC using common brand names and/or other resources be presumed

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34/ MCI at 15-16 (citing *Capital Tel. Co. v. FCC*, 498 F.2d 734, 739 (D.C. Cir. 1974); *GTE v. United States*, 449 F.2d 846, 855 (5th Cir. 1971); *MCI Telecommunications Corp. v. O'Brien Marketing Inc.*, 913 F.Supp. 1536 (S.D. Fla. 1995)). These cases do not use the "successor" or "assign" rubric because they were decided before the 1996 enactment of Section 251(h).

35/ MCI at 13 (citing *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983)); *see generally* MCI at 13-15 and cases cited therein.

36/ *See supra* at Section II.

to be a "successor" or "assign" -- that is, the affiliate is an *alter ego* of the ILEC, and must be subject to the same local competition and dominant carrier obligations -- unless the ILEC affiliate can rebut the presumption with factual evidence.

B. The Declaratory Ruling We Seek is Consistent with Commission Precedent.

1. The ILECs Mischaracterize the *Non-Accounting Safeguards Order* and Section 53.207 of the Commission's Rules.

The ILECs mischaracterize the *Non-Accounting Safeguards Order* and Section 53.207 of the Commission's Rules as providing that a "CLEC" affiliate can be deemed a "successor or assign" under Section 251(h)(1) *only* if the ILEC has transferred to the "CLEC" affiliate network elements that must be provided on an unbundled basis pursuant to Section 251(c)(3). 37/ The ILECs also mischaracterize our Petition as seeking to designate *any* ILEC affiliate that offers local exchange service in the ILEC's service territory as a successor or assign under Section 251(h)(1). Neither is accurate.

The *Non-Accounting Safeguards Order* and Section 53.207 address only two polar extremes of the issue at hand; our Petition seeks clarification with respect to situations in between those extreme cases. At one extreme, the Commission states in the Order that the offering of local exchange service by a BOC affiliate does not, in and of itself, make the affiliate a successor or assign under

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37/ SBC at 4; GTE at 10-12; Bell Atlantic at 3-4; SNET at 4-6; BellSouth at 2-4, 15; *see also* Ameritech at 19-20.

Section 251(h). 38/ Our Petition does not contest this conclusion, and contrary to the claims of some ILECs, 39/ does not seek to designate such carriers as successors or assigns. Rather, our Petition requests only that a specific subset of such affiliates -- those that receive resources of value from the ILEC -- be so designated.

This request is fully consistent with the Commission's conclusion at the other extreme of the issue that if an affiliate receives from a BOC network facilities that are subject to the unbundling requirement of Section 251(c)(3), the affiliate would constitute an "assign" under Section 3(4) of the Act with respect to those network elements. 40/ Indeed, the text of the *Non-Accounting Safeguards Order* explicitly addresses the transfer of "capabilities" and "services" from the ILEC to its affiliate, and does not limit itself to the transfer of network facilities. The *Order* thus foreshadows the relief we seek here.

The relevant analysis in the *Non-Accounting Safeguards Order* is directed at the question of whether BOCs' Section 272 long distance affiliates may also provide local service. That *Order* says nothing about the central issue raised by our Petition: the regulatory status that should apply when Section 272 or other

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38/ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055 ¶ 312 ("[A] BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange service. . ." "We find no basis in the record of this proceeding to find that a BOC affiliate must be classified as an incumbent LEC under section 251(h)(2) merely because it is engaged in local exchange activities."); 47 C.F.R. § 53.207.

39/ *See* Bell Atlantic at 3-4; SNET at i, 5, 6; SBC at 4; Ameritech at 19-20.

40/ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054, ¶ 309; 47 C.F.R. § 53.207.